U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 28 2005

EAC 04 146 53296

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner provides information technology services. It seeks to employ the beneficiary permanently in the United States as a senior software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary had the requisite experience and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. We find that the petitioner has now established its ability to pay the proffered wage in the years addressed by the director and that the beneficiary had the requisite experience as of the date of filing. Nevertheless, for the reasons discussed below, we will remand the matter to the director for a determination as to whether the petitioner has demonstrated its ability to pay the proffered wage after 2003, whether the job offer is still valid in the location represented to DOL and whether there was ever a bona fide job opportunity.

To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS), formerly the Service or INS, must ascertain whether the alien is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The Form ETA-750A requires a Master's degree and two years of experience as a senior software architect. The director concluded that the petitioner had failed to submit employment letters establishing the two years of experience. On appeal, the petitioner submits a letter from the [redacted] confirming the beneficiary's employment as a senior software engineer from April 1999 to March 2000 and a letter from the [redacted] of [redacted] confirming the beneficiary's employment as a senior software architect from June 1996 to March 1999. Thus, the petitioner has overcome that basis of the director's decision.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 18, 2001. The proffered wage as stated on the Form ETA 750 is $75,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 2000.

On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of $750,000, no net annual income, and to currently employ 92 workers in the United States and India. In support of the petition, the petitioner submitted Form 1120 corporate tax returns for the petitioner for the years 2001, 2002 and 2003. The tax returns reflect the following information:

	2001	2002	2003
Net income	($78,982)	$43,434	($37,981)
Current Assets	$33,317	$75,628	$45,818
Current Liabilities	$3,200	$0	$0
Net current assets	$30,117	$75,628	$45,818

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 29, 2005, denied the petition.

On appeal, counsel asserts that the petitioner paid the beneficiary in 2001, 2002, 2003 and 2004 and that the petitioner's foreign parent company supplies funds to the petitioner. The petitioner submits Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2001, 2002, 2003 and 2004 reflecting wages of $123,625, $112,500, $90,000 and $66,000 respectively. The beneficiary's wages in 2004 were $9,000 less than the proffered wage. The petitioner did not submit its 2004 tax return or audited financial statements for that year. Rather, it submitted financial statements for its foreign parent company, Forms 5472 reflecting wages transferred to the parent company in 2001 and 2002, statements from Ketan K. Kotecha, a chartered accountant, affirming that the foreign parent company made "Non Equity Exports" to the petitioner in 2001, 2002 and 2003, the foreign parent company's bank statements for 2004 and the petitioner's work contracts.

Where the petitioner has submitted the required initial documentation required by the regulation at 8 C.F.R. § 204.5(g)(2), CIS will first examine whether the petitioner employed and paid the beneficiary after the priority date. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner paid the petitioner above the proffered wage, in diminishing amounts, in 2001, 2002 and 2003. The petitioner, however, has not established that it employed and paid the beneficiary the full proffered wage in 2004.

The director, however, did not address the petitioner's ability to pay the proffered wage after 2003. Thus, we will remand the matter to the director for the purpose of examining whether the petitioner has established its ability to pay the proffered wage after 2003. In analyzing this issue, the director should consider the following.

Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the director should consider whether the petitioner has demonstrated why the documentation

specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, the director may take into account that bank statements show the amount in an account on a given date. Third, when relying on bank statements, the petitioner must demonstrate that the funds reported on the bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that is considered in determining the petitioner's net current assets.

We acknowledge that the bank statements are those of the petitioner's parent corporation; thus, the cash would not be represented on the petitioner's tax returns. Nevertheless, the director should consider that a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Moreover, *Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003), stands for the proposition that CIS need not consider the financial resources of individuals or entities who have no legal standing to pay the wage. Therefore, the director may wish to consider whether the parent corporation had any obligation to pay the petitioner's payroll and, if so, why it failed to pay the difference between the wages paid to the beneficiary and the proffered wage in 2004.

In addition, the record contains other discrepancies that were not raised by the director that the director may wish to consider in any future decision. Specifically, the director may wish to consider whether the location of the job specified before the DOL is still valid and whether there was ever a bona fide job opportunity. In addressing these issues, the director should allow the petitioner an opportunity to respond to the following information.

The Form ETA 750A submitted to DOL lists the petitioner's address as [redacted] The petitioner indicated on this form that the beneficiary would work at this address and at "unanticipated clients sites." On Part 1 of the Form I-140 petition, the petitioner listed its address as [redacted] We note that this is the same address as counsel's address. On Part 6 of the petition, the petitioner indicated that the beneficiary would work at the same address as listed in Part 1. The petitioner's tax returns all list a California address and the Forms W-2 for its employees submitted on appeal all reflect employee addresses in California, New Jersey and one in Virginia. In fact, the beneficiary has been working for the petitioner since April 2000 in California.

Given the inconsistent information regarding the petitioner's current address, this office reviewed the petitioner's corporate information publicly available on the Internet sites operated by the State of California and the State of Maryland. This information reveals that the petitioner initially incorporated in 1999 in Maryland and registered in California on April 27, 2001. On January 29, 2004, the petitioner filed a corporate resolution with the State of Maryland changing its principal office from [redacted] That resolution is available for download from the State of Maryland's website and has been added to the record. Finally, the Maryland website indicates that the petitioner is no longer in good standing in Maryland. The director may wish to consider whether this information suggests that the petitioner no longer operates an office at the original location represented to DOL as the job site.

In addition, on the Form ETA-750A, the petitioner represented to DOL that the job title was senior software engineer. In addition, the petitioner represented to DOL that the beneficiary's immediate supervisor would be the petitioner's president. On the Form ETA-750B, the beneficiary indicated that he had worked for the petitioner as a senior software engineer since April 2000.

On the petitioner's tax returns, schedules E, the beneficiary is listed as the highest paid officer. Given this information, this office conducted a search of the petitioner's name using an Internet search engine. The results reveal that the petitioner is actually the petitioner's founder, Chief Architect and Chief Technical

Officer. Thus, it does not appear that the petitioner is merely a senior software engineer or that he will report to the president, whose salary is less than the beneficiary's salary. Finally, we note that the other officer has the same last name as the beneficiary, suggesting there is also a family relationship.

Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). Under 20 C.F.R. §§ 626.20(c)(8), 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment. As discussed above, the beneficiary appears to be a relative of an officer of the petitioner and is a founder and officer of the petitioner himself. For the reasons discussed above, the information regarding the petitioner's proposed supervisor was material to the certification of the ETA-750A as these positions and relationships can be construed as evidence that the job offer is not bona fide. Therefore, the director may wish to consider whether the labor certification should be invalidated pursuant to 20 C.F.R. § 656.31.

Therefore, this matter will be remanded for consideration of whether the petitioner had the ability to pay the proffered wage in 2004, whether the job is still being offered at the location represented to DOL and whether there was ever a bona fide job opportunity. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.